

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DISH NETWORK, LLC

and

Case No. 27-CA-131084

DAVID RABB, an Individual.

**RESPONDENT DISH NETWORK LLC'S EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE DECISION**

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondent DISH Network, LLC ("DISH"), by and through its undersigned counsel, hereby files the following exceptions to Administrative Law Judge Robert A. Ringer ("ALJ")'s March 26, 2015 Decision ("Op."). As set forth below, DISH excepts to the ALJ's finding that it violated Section 8(a)(1) of the National Labor Relations Act ("Act") by maintaining a Solicitation in the Workplace policy (Op. 13:7-9) and issuing former Inside Sales Associate ("ISA") David Rabb a warning and discharging him, allegedly for protected concerted activities. (Op. 13:11-12).

**Exceptions to the ALJ's Conclusion that DISH
Discharged Rabb for Protected Concerted Activity.**

A. Exceptions to the ALJ's Conclusion that the General Counsel met its "*Prima Facie*" Burden Under *Wright Line*.

1. DISH excepts to the ALJ's finding that the General Counsel met its "*prima facie*" case under the *Wright Line* test for unlawful discrimination. 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). *See* Op. at 12:4-11.

2. The ALJ erred in finding that "Evans bore animus against [Rabb's] activity, when she sought his firing for breaching the solicitation policy." *See* Op. at 12:7-8. This finding is neither supported by the record nor connected to the events concerning Rabb's discharge; it ignores record evidence that Evans supported Rabb's protected activity and was not the sole

decision-maker; and it improperly evaluates DISH's business judgment and the impact of being considered for discharge at DISH. *See* Respondent's Br. at Pt. IV.B.1, pp. 16-18.

3. The ALJ erred in finding that "[a]nimus is also shown by the close timing between Rabb's escalated protected activity (i.e., filing a DOL complaint and soliciting workers to join his lawsuit) and his firing." *See* Op. at 12:8-10. Rabb engaged in protected activity for 15 months before his discharge. The concept of "escalated protected activity" is a fiction that contradicts the record, the impressions of DISH's management, business reality, and legal sense. *See* Respondent's Br. at Pt. IV.B.2, pp. 17-21.

B. Exceptions to the ALJ's Conclusion that DISH Failed to Meet its Burden Under *Wright Line*.

4. DISH excepts to the ALJ's finding that the Respondent "failed to show that it would have terminated Rabb, absent his protected activity." *See* Op. at 12:15-18.

5. The ALJ erred by failing to consider any of the evidence DISH presented in support of its affirmative defense, including numerous other employees who were discharged for similar and even lesser conduct, as well as discipline Rabb received for similar or lesser conduct. *See* Op. at 12; Respondent's Br. at Pt. IV.C.1, pp. 22-23.

6. The ALJ erred by repeatedly misrepresenting the nature of Rabb's misconduct in order to compare it to conduct considered less egregious by DISH. *See, e.g.,* Op. at 6:29-30 (claiming Rabb was disciplined for "placing a customer on silent hold") 8:8 ("practice of using silent hold for restroom breaks"); 8:10 & n.23 ("silent hold usage"); 8:19 ("plac[ing] customers on silent hold"); 8:21 ("silent hold practices"); 12:10 ("longstanding restroom practices"); 12:22-23 ("DISH's decision to fire Rabb for using silent hold to use the restroom"); 12:25-26 ("using the restroom"); 12 n.34 (claiming Rabb was "fired for *solely* [*sic*] placing a caller on silent hold"). These euphemisms do not accurately describe the conduct for which Rabb was

disciplined, (i.e. putting a customer on silent hold under false pretenses at the end of a sales call in order to avoid the next call and, in his words, to "take a piss"). *See* Respondent's Br. at Pt. IV.C.2.a, pp. 23-24.

7. The ALJ erred by supplanting DISH's business judgment with his own. *See* Op. at 7 nn.20-21; 9:25-32; 12:22-23; 12 nn.34-36. The ALJ euphemized and attempted to downplay Rabb's conduct (*see above* ¶ 6); opined that Rabb should have been treated differently because he was "somewhat long term" (*see* Op. at 12 n.36); and surmised that "if DISH were truly concerned with ISAs avoiding their calls, it would also respond to the multitude of ISAs, [*sic*] who exceed their BREAK AUX allotment," even though DISH, in its business judgment, views silent hold and customer abuse more seriously than exceeding BREAK AUX usage. *See* Op. at 12 n.35; *see also* Op. at 7:16-22 & nn.20-21. The ALJ also exaggerated the record when attempting to impress his business judgment upon DISH. *See* Op. at 7:21-22 (characterizing seven minutes of BREAK AUX as "a whopping 121 percent above the reported 35-minute allotment" and attempting to compare it with Rabb's misconduct); 9:25-32. *See* Respondent's Br. at Pt. IV.C.2.b, pp. 24-25.

8. The ALJ's misstated reasons for Rabb's discharge and misplaced business judgment created additional errors in his attempts to compare Rabb to other DISH employees. The ALJ ignored the conduct of employees who were discharged for similar violations because he improperly deemed their conduct more severe (even though some their conduct was less severe). *See* Op. 12 n.34; Respondent's Br. at Pt. IV.C.2.c, pp. 26-27. The ALJ erred in attempting to compare his version of Rabb's conduct with non-specific references to other employees' alleged conduct because the other employees' alleged conduct is not similar, in that it was not known to management and does not rise to the level of Rabb's misconduct before

management. *See* Op. 6:12-14; 6:17-19; 6:22-23; 8:25-28 & n.24; 8:15 to 9:2; 12:16-17; Respondent's Br. at 27.

9. The ALJ erred by attempting to compare Rabb to employees who engaged in conduct that DISH considers less serious and less evasive (i.e., exceeding BREAK AUX usage). *See* Op. at 7:16-22 & nn.20-21; 9:25-32; 12:21-23 & n.35. In doing so, committed three additional errors. First, the ALJ reversed the burden of proof for establishing comparators. *See* Op. at 7:16-22 & nn. 20-21; 9:25-32 & n.27; Respondent's Br. at Pt. IV.C.2.c, p. 28. Second, the ALJ "picked and chose" his comparators. *See* Op. 25 & n.6; Respondent's Br. at 28. Third, the ALJ failed to account for mitigating circumstances, such as using BREAK AUX as a reasonable accommodation under the Americans with Disabilities Act. *See* Op. at 9:25-32; 12:22-23; Respondent's Br. at 28-29.

10. The ALJ erred by misrepresenting DISH's coaches as supervisors under Section 2(11) of the Act. Coaches do not hire, fire, transfer, discipline, promote, assign, schedule or bear responsibility for directing employees. Neither the GC nor the ALJ presented any argument or analysis on this point. *See* Op. at 8:15 to 9:2; Respondent's Br. at Pt. IV.C.2.d, p. 29.

11. The ALJ erred in concluding that Rabb had a "longstanding practice of placing customers on silent hold to use the restroom, which was tacitly accepted by his Coaches." *See* Op. at 12:16-17. This conclusion erroneously conflates lesser conduct (i.e., simply using silent hold during a call) with "placing customers on silent hold to use the restroom" (*see above* ¶ 6) and misrepresents "placing customers on silent hold to use the restroom" as the sole reason for Rabb's discharge (*see id.*). It also relies on misrepresentations of coaches as management or decision makers (*see above* ¶ 10); improper inferences (in light of the burden of proof) (*see* Op.

at 5 n.10, 6 n.14, 8 nn.22-23); and mischaracterizations of the record. *See* Op. 5 n.11; Op. 6 n.12; Respondent's Br. at Pt. IV.C.3.a, pp. 29-31.

12. The ALJ erred in concluding that DISH lacked analogous disciplinary examples (i.e. "the clear absence of discharges for placing callers on silent hold"). *See* Op. at 12:19-20. This misstates the reason for Rabb's discharge ("placing callers on silent hold") and relies on the ALJ's erroneous comparative analysis. *See above* ¶¶ 5-8; Respondent's Br. at IV.C.3.b, p. 33.

13. The ALJ erred in concluding that "DISH's decision to fire Rabb for using silent hold to use the restroom instead of BREAK AUX is problematic" (Op. at 8:21-24). This conclusion is problematic because it relies on a false comparison between using BREAK AUX and Rabb's misconduct, the ALJ's mischaracterization of the latter ("us[ing] the restroom"), and the ALJ's substitution of his own business judgment for that of DISH's management. *See above* ¶¶ 6-7; Respondent's Br. at Pt. IV.C.3.c, p. 34.

14. The ALJ erred in concluding that "the methodology that DISH used to trap Rabb suggests invidious intent" and "Evans and Gass misrepresented their intentions about trying to benevolently aid [Rabb], and, instead, sought to ensare him." *See* Op. 12:23:25. This conclusion erroneously omits the undisputed fact that Rabb engaged in his misconduct 15 feet away from management and then reacted rudely to a manger when confronted. *See* Respondent's Br. at Pt. IV.C.3.d, pp. 34-36. It relies on bizarre conclusions, e.g., that Rabb's manager should have "located" him instead of waiting at his desk, even though doing so could have taken five minutes (*see* Op. 9:15-16); and false "contradictions," e.g., the alleged contradiction between "being in a meeting" and "being by a door" in the meeting (*see* Op. at 9 n.25); *See* Respondent's Br. at 35.

15. The ALJ erred in concluding that DISH should have responded "less drastically to someone using the restroom" and should have conducted an investigation to determine whether

non-managerial coaches had previously accepted Rabb's conduct. (Op. at 12:25-29). This reasoning mischaracterizes Rabb's misconduct and DISH's actions, and substitutes the ALJ's business judgment for that of DISH. *See* Respondent's Br. at Pt. IV.C.3.e, pp. 36-37.

16. The ALJ erred in recirculating his erroneous findings regarding animus and "escalated protected activity" into the second phase of the *Wright Line* analysis. *See* Op. at 12:28-32; *above* ¶¶ 2-3; Respondent's Br. at Pt. IV.C.3.f, p. 37.

C. Exceptions to the ALJ's Conclusion that DISH Maintained an Unlawful Solicitation Policy

17. The ALJ erred in holding that DISH maintains an unlawful solicitation policy. *See* Op. at 10:5-20. The ALJ erroneously treated DISH's policy as *per se* unlawful without even considering DISH's "crazy and chaotic" sales floor, which resembles that involved in cases where similar policies were upheld due to concerns regarding continuity of business and customer care, similar to those raised when four employees were disrupted from the jobs due to Rabb's activities. *See* Respondent's Br. at Pt. IV.D, pp. 38-39.

D. Exceptions to the ALJ's Conclusion That DISH Violated Section 8(a)(1) of the Act by Warning Rabb for "Solicitation"

18. The ALJ erred in holding that DISH unlawfully warned Rabb for soliciting in working areas. *See* Op. at 11:26-29. It is undisputed that Rabb was warned for distributing post-it notes in working areas after an employee complained about receiving a post-it note from Rabb at the employee's desk. *See* Respondent's Br. at Pt. IV.E, pp. 39-40. The ALJ's erroneous conclusion is based on yet another mischaracterization of Rabb's conduct

19. The ALJ erred in holding that DISH "made no showing that [Rabb's] activities interfered with his own work, the work of others, or Call Center operations." (Op. at 11:28-29) The ALJ erred because no showing is required for prohibiting distribution in working areas and four employees complained about Rabb's "activities." *See* Respondent's Br. at Pt. IV.E., p. 40.

20. Based on the above, DISH excepts to each of the ALJ's Conclusions of Law. *See* Op. at 13:1-5.

21. Based on the above, DISH excepts to the "remedy" in its entirety *See* Op. 13:19 to 14:2 & Errat[a].

22. Based on the above, DISH excepts to the "order" in its entirety. *See* Op. 14:4 to 15:29 & Errat[a].

WHEREFORE, the reasons stated herein and in the accompanying Brief, Respondent DISH Networks respectfully requests that the Board vacate the ALJ's decision and dismiss the General Counsel's Complaint in the above-captioned case.

Dated: May 7, 2015

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY P.C.

By



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